United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-5025-6

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 75-5025-6

In re

CONTINENTAL VENDING MACHINE CORP. and
CONTINENTAL APCO, INC.,

Debtors,

JAMES TALCOTT, INC.,

Appellant,

IRVING L. WHARTON, Trustee,

Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK

APPELLEE'S BRIEF

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Questions Presented

1. Did the court below properly reject the erroneous findings of the Special Master?

2. Were the allowances granted by the court below to reimburse a secured creditor for legal fees and disbursements so clearly erroneous, an abuse of discretion or otherwise improper so as to warrant reversal thereof?

3. Did the fact that the Judge, who awarded allowances for reimbursement, testified in another controversy separate and distinct from the matter upon which he ruled, require his disqualification pursuant to Title 28, U.S.C., § 455?

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Statement of the Case

James Talcott, Inc., a secured creditor of the debtors, pursuant to the decision of this Court in In Re

Continental Vending Machine Corp., 491 F.2d 813 (2d Cir. 1974), filed a proof of claim for reimbursement of legal and accounting fees (Document 8) on April 30, 1974. The claim was based upon a clause in the financing agreements entered into between Talcott and the debtors prior to the institution of the Chapter X proceedings (159a).

Judge Mishler, in charge of the proceedings since July, 1963, directed that hearings be held and referred the matter to Magistrate Catoggio as Special Master. The Master rendered his report in April, 1975. On May 15, 1975 the Trustee filed objections to the Master's Report and on June 13, 1975, Talcott moved before Judge Mishler for an order confirming the Report (9a).

Thereafter, on November 18, 1975, Judge Mishler issued his Order and Opinion drastically reducing the claim for legal fees and allowing the accounting fees as approved by the Master (157a, et seq.). By Notice of Motion dated November 21, 1975, the Trustee moved for reargument and by Notice dated December 2, 1975, Talcott cross-moved seeking for the first time an order disqualifying Judge Mishler.

In the interim, Judge Mishler testified on June 30, 1975, as a witness before Judge Judd on the unrelated issue of the application of the Silco surplus funds (56a-95a).

On December 15, 1975, Judge Mishler entered a Decision and Order granting the Trustee the relief requested in his motion to reargue and denying Talcott's motion that he disqualify himself (201a-209a).

We have submitted this brief statement only because in our opinion the Talcott Statement (Br. 2-13) contains a great deal of extraneous matter not relevant to the limited issues now on appeal.

POINT I

THE COURT BELOW PROPERLY REJECTED THE ERRONEOUS FINDINGS OF THE SPECIAL MASTER AND ITS AWARD OF ALLOWANCES SHOULD BE AFFIRMED

It is well settled that the District Court Judge is conferred with a broad discretion in determining allowances in a Chapter X proceeding. An appellate court will not interfere except for a clear abuse of discretion or an erroneous application of the law. Dickinson Industrial Site, Inc. v. Cowan, 309 U.S. 382 (1940); Gochenour v. Cleveland Terminals, 142 F.2d 991 (6th Cir. 1944), cert. den., 323 U.S. 767 (1944).

Talcott first objects to the application by the court below of § 243 of the Bankruptcy Act to its claim for reimbursement for legal fees and expenses. It is Talcott's position that Judge Mishler erred in disallowing several items of legal services because they were not for services in connection with a plan or in connection with the administration (Br. 13-14).

The claim for reasonable attorney's fees arises out of the specific language of the security agreement (159a). It is the function of the court to determine what are reasonable attorney's fees, whether the work performed falls

within the clause of the security agreement, and finally, to authorize allowances pursuant to § 243. This is precisely what was done by Judge Mishler. An examination of the Appendix to Judge Mishler's decision will at once reveal that he allowed reimbursement for those legal services falling within the language of the security agreement (192a-193a). Where the claim for services were disallowed, it was only because the Court found that these services were not part of the collection process and were performed by Talcott's attorney solely for the benefit of Talcott.

We submit that in determining the amount of reasonable compensation allowable to the attorneys for creditors pursuant to § 243 the Court must determine: (1) is compensation allowable, (2) what is reasonable compensation, and (3) for what services may compensation be allowed.

With respect to (1), the Trustee concedes and the court below properly found that the security agreement does provide for reasonable attorney's fees in connection with the collection process. Thus, with respect to this item there is no dispute.

As to item (2), Mr. Hahn, senior partner in the firm representing Talcott, originally claimed reimbursement for his time on the basis of $100 per hour (Tr. 425-426).

Indeed, during the course of the hearings before the Special Master, counsel for Talcott submitted an hourly rate schedule showing an hourly rate in 1963 of $100 for Mr. Hahn, $70 for Mr. Ryan, $45 for Mr. Novick and $25 for Mr. Abeson. These rates increased in 1970, 1972, 1973 and by 1974 the hourly rate claimed was $150 for Mr. Hahn, $110 for Novick and Ryan and $75 for Abeson.

The Trustee urged the Special Master to adopt the schedule used by Judge Mishler in In Re Continental Vending Machine Corp., 318 F.Supp. 421 (E.D.N.Y. 1970). Talcott, apparently realizing that if the schedule relied upon by Mr. Hahn were applied to the total hours claimed, the result would far exceed the amount of the allowance sought and accepted the Trustee's position. Accordingly, the Special Master adopted Judge Mishler's earlier schedule (149a), and Judge Mishler used the same basis in his decision (191a).

Thus, the only dispute relates to those services which the Special Master allowed over the Trustee's objections, which objections, for the most part, were sustained by Judge Mishler. Before turning to the specific objections some comment is required covering POINT II of Talcott's brief (Br. pp. 17-21).

At the outset, Talcott appears to argue that the

reference to the Special Master was improper in that the "exceptional circumstances" required by La Buy v. Howes Leather Co., 352 U.S. 249 (1957) were not present. It is interesting to note that at or about the same time that Judge Mishler made the reference herein, Judge Judd, in another matter in the Eastern District, made a similar reference to Magistrate Catoggio. In that case the defendants challenged the reference on appeal and in C.A.B. v. Carefree Travel, Inc., 513 F.2d 375 (2d Cir. 1975), this Court held the reference was proper. The Court stated, at 513 F.2d 383:

> "Two other factors are worthy of mention. In the first place there is nothing to indicate that the Eastern District of New York or the judges thereof are attempting to evade or avoid their responsibilities by excessive references, as may have been the case prompting the broad language of the decision in LaBuy, supra. We believe these conscientious judges have complied not only with the letter but with the spirit of Rule 53(b) which carries over, as we have indicated, into the Federal Magistrates Act. They have made references 'the exception and not the rule.'"
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> "To be sure, there are other judges in the Eastern District to whom the case might have been referred. They, too, are busy judges, with the weighted filings in the court being 41st among the districts in the United States and the number of trials completed per judge 47th. See Management Statistics for the United States Courts 1974 at 22. And they would have had to recommence this case almost from the beginning.

> "We hold, then, that reference to the magistrate here was the exception and not the rule and was under 'exceptional circumstances,' making it proper within Federal Rule 53(b) as it has been incorporated in 28 U.S.C. § 636."

In any event, the issue of the propriety of the reference appears to be moot since, as Talcott concedes, it did not object to the reference (Br. p. 18).

One final note with respect to the reference. Talcott suggests that Rule 53e(2), F.R.C.P., virtually mandates acceptance by the Court of the Master's findings. To the contrary, the judge should neither abandon to the magistrate his prerogatives, nor act simply as a rubber stamp in respect to the magistrate's report. Indeed, after a review of the evidence, it is not uncommon to find, as here, that the result reached by the Court is exactly contrary to that recommended by the magistrate. See C.A.B. v. Carefree Travel, Inc., supra, at p. 383.

We turn now to the specific question of what services performed by Talcott's counsel are properly reimbursable. It is Talcott's position that all of the services performed by counsel as delineated in the affidavits and as testified to at the hearings are properly reimbursable by the debtors. Talcott has taken the very broad view that, since all of the services performed has as their goal the

protection of Talcott's security interest, the language of the financing agreements (159a) provides blanket coverage for all of these services. The Trustee, on the other hand, has contended that the financing agreements provide for attorney's fees only in connection with the collection of receivables or other obligations assigned to Talcott, or in defense of actions or proceedings directly related to the receivables or other obligations. The Trustee, of course, recognizes that Talcott was concerned with protecting its interests when first a conservator was appointed and subsequently when reorganization proceedings were commenced. Talcott's concern was no less than that of any other creditor, but this alone is not a basis upon which Talcott can seek to impose a financial burden on the other creditors to the extent of having the assets of the debtors used to pay in full Talcott's legal expenses.

The testimony adduced at the hearings makes it abundantly clear that virturally all of the work performed by the Hahn firm for Talcott in connection with Continental is included in the present claim. Thus, to allow the claim would in effect require the creditors of Continental to pay for Talcott's legal expenses in their entirety.

Although arising in a Chapter XII matter, issues

strikingly similar to those in the instant case were raised in Matter of Gossage, 6 CBC 428 (W.D.Mo. 1975). There, the Court stated, at p. 430:

> "There may be no recovery for legal services which are duplicative of the work of the trustee or the debtor or of their respective counsel, nor for non-legal services not requiring the expertise of an attorney. West v. Fradenberg, Webb, Beber, Klutznick and Kelly, 86 F.2d 318 (8 Cir., 1936). Fees indirectly related to the collection process, and activities in the nature of general services to the client may not be charged to debtor's estate. John Hancock Mutual Life Insurance Co. v. Casey, 155 F.2d 229 (1 Cir., 1946). When the Chapter XII petition was filed, a new ball game started, as it were. What happened to debtor before she came under the supervision of the bankruptcy court is of no concern to the Court; after she is under a Chapter XII proceeding what the estate is expected to pay, for what and why, is of great concern to the Court. It should also be remembered that what may be fair, just and proper charges to the client may not be proper charges against the Chapter XII estate. The estate must only pay for services strictly necessary for collection and for legal services only."
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> "Even though the client feels that the attorney should attend every bankruptcy hearing on the chance that it might affect their secured position, and even though the client feels that any legal expense incurred, either directly or remotely, is covered by a contract between the client and the debtor-in-possession under a Chapter XII proceeding, it is inequitable to charge all of the expenses of whatsoever nature or kind to the estate of a Chapter XII proceeding which is being liquidated under the auspices of the bankruptcy court for the benefit of all creditors. To pay large attorney fees to attorneys attending all hearings of the

proceeding, whether or not the hearing involved their claim (a claim which in this case was not being contested), on which they were fully secured and protected and which the client and its attorneys knew was fully secured by their own appraisals, and under these circumstances to charge all of their attorneys' time to a debtor as a secured claim is unfair, unjust, inequitable and will not be allowed by the court." (Emphasis added)

The subject of which legal services are properly reimbursable was discussed by the Court in In Re Cambridge Nuclear Corp., an unreported decision of Chief Judge Caffrey of the United States District Court of Massachusetts. In an opinion dated June 25, 1974, the Court dealt with an application for attorney's fees made by a bank pursuant to a provision in a promissory note which provided for payment of "reasonable attorney's fees and expenses incurred." The Court held:

"It is well settled that in a Chapter X Reorganization the bankruptcy court has jurisdiction to allow, deny or reduce attorney's fees claimed to be chargeable to the debtor's estate. Massachusetts Mutual Life Insurance Co. v. Brock, 405 F.2d 429, 432-33 (5th Cir. 1961), cert. den., 395 U.S. 906; Chicago & West Towns Railways v. Friedman, 230 F.2d 364, 368 (7th Cir. 1961), cert. den., 351 U.S. 943.

* * * *

"It is also axiomatic that in the administration of a bankruptcy estate where the fees sought must come from the assets of the debtor's estate the court has a duty to closely scrutinize the claims to protect the estate. National City Bank

of New York v. Saldona Crosas Realty Corp., 86 F.2d 923 (1st Cir. 1936); Massachusetts Mutual Life Insurance Co. v. Brock, supra, at 423-3.; In Re Craigie Arms, Inc., 52 F. Supp. 110, 112 (D. Mass. 1943).

* * * *

"Fees indirectly related to the collection process, and activities in the nature of general service to the client, may not be charged to a debtor's estate. John Hancock Mutual Life Insurance Co. v. Casey, 155 F.2d 229, 235 (1st Cir. 1946); In Re Webb & Knapp, Inc., 363 F. Supp. 423, 426 (S.D.N.Y. 1973). Likewise there may be no recovery for legal services which are duplicative of the work of the trustee or the debtor or of their respective counsel nor for non-legal services not requiring the expertise of an attorney. West v. Fradenburg et al., 86 F.2d 318, 320 (8th Cir. 1936)."

In reviewing the various services for which allowances were claimed the Court held that as to the following services the creditor rather than the estate was responsible for payment. The particular services enumerated are of significance in the present proceeding because much of the work performed by the Hahn firm for which reimbursement is now sought falls directly within the categories which the Court held to be an obligation of the creditor and not the estate. The rejected types of legal activity included:

(1) Attorney's time spent in analyzing potential personal liability of debtor's officers and directors;

(2) Legal time spent exploring a method to secure funds advanced to the debtor during the Chapter X proceeding;

(3) Legal time spent researching and determining the validity of creditor's security interest in debtors' subsidiary corporations;

(4) Value of legal services for efforts of creditor's counsel to sell certain of debtors' assets;

(5) Legal time spent by counsel negotiating with potential buyers of debtors' assets including the actual purchase;

(6) Legal time spent in miscellaneous day-to-day activities of counsel;

(7) Legal time spent researching reclamation petitions filed against the debtor.

The Court in Cambridge found that almost half of the legal services performed fell within non-collection categories and specifically disallowed that portion of the claim. In so doing the Court concluded with a reference to the reminder given by the Supreme Court as to the purpose and policy of Chapter X in SEC v. American Trailer Rentals Co., 379 U.S. 594, 614 (1965):

"It seems clear that in enacting Chapter X the

Congress had the protection of public investors, and not trade creditors, in mind."

We turn now to a discussion of the specific items of service for which an allowance is sought. In order to aid the Court we adopt the references used by Talcott to the Hahn affidavit (Record Document 8), the appendix pages of the Master's Report and the decision of Judge Mishler and the transcript of Hahn's testimony (See Br. p. 21).

Item I. SEC Investigation and Conservatorship Proceeding (138a; 164a-165a; Tr. 408-580)

Hahn claims to have expended between 175 and 187 hours in connection with these matters, including court appearances with respect to the appointment of a conservator and the possible sale of the assets of the debtors. It is the Trustee's position, accepted by Judge Mishler, that none of this work falls within the language of the financing agreements relied on by Talcott and that the legal services performed were solely for the benefit of Talcott, having no relationship to the collection process and therefore none of this time is chargeable to the debtors except for the work performed as set forth in paragraph 26 of the Hahn affidavit which, according to the testimony, involved 5 hours of time.

Talcott's reliance on Brown v. Security National

Bank of Greensboro, 200 F.2d 405 (4th Cir. 1952), is entirely misplaced. As pointed out by the Court, the attorneys seeking compensation, as a result of their efforts, collected approximately $50,000 on the bonds before the plan of reorganization was carried out. In addition, they were successful in requiring interim payments of interest and payments on maturing bonds. Thus, it is clear that, to the extent that work was performed for the purpose of obtaining monies for the secured creditor directly related to the bonds, compensation was permitted. In the instant matter the Court has recognized to the extent of more than $28,000 that work performed by the Hahn firm is properly reimbursable. It is the Trustee's position, however, that a considerable amount of work done by the Hahn firm does not fall within the language of the financing agreement, and to that extent the services were performed solely for Talcott and not a proper charge against the estate. Certainly, the Brown case does not stand for the proposition that an attorney for a secured creditor may be compensated for all of the work that he does and, indeed, the cases relied upon by the Trustee set forth the rule of law applicable to this situation.

Since none of the work performed under this item related to the collection process, reimbursement pursuant

to the contractual agreement would be improper. Similarly, since this work did not relate to the plan of reorganization or the administration of the debtor's estate, an allowance under § 243 is not warranted. Regardless of what standard is applicable, the Master clearly erred in allowing compensation and the court below properly rejected his findings.

Item II. Proceedings Re New York and New Jersey Routes. Master 138a; Judge 165a-167a; Tr. 719-770.

Hahn testified the work involved with respect to this item required approximately 160 hours of his time. At the hearings before the Master the Trustee objected to the time spent in connection with the work detailed in paragraphs 31 and 32, the preparation of schedules referred to in paragraph 35 and the conferences referred to in paragraph 36 of the Hahn affidavit (Record Doc. 8). The Trustee recommended an allowance of 99 hours. The Master allowed 160 hours which was reduced to 115 hours by Judge Mishler. It is this latter reduction to which Talcott objects.

For most of the time covered by the application the Hahn firm failed to keep time records. Although some attempt was made to reconstruct the actual time spent by reference to file memoranda and court papers, virtually all

of Hahn's testimony was at best a guess at the time spent over ten years before. Hahn was forced to estimate his time by looking at a court paper and deciding how much time he spent in reviewing or preparing it, or if a memo referred to a conference or court hearing, he would attempt to guess how long it took. It is well settled that a law firm is not entitled to the full amount it seeks where it fails to keep time records. Hudson & Manhattan R.R. Co., 339 F.2d 114 (2d Cir. 1964); Matter of Wal-Feld Co., 345 F.2d 676 (2d Cir. 1965); 345 F.2d 677 (2d Cir. 1965); In Re Seabord Drug Co., 242 F. Supp. 571 (S.D.N.Y. 1965).

The Master completely ignored the often repeated warnings to attorneys as set forth in the above cases and accepted the Hahn estimates in full. We disagree with the findings of the Master that documents submitted by Talcott's attorneys "give complete and reliable support to the reconstruction of the time records (148a)." The unqualified acceptance of time estimates by the Master was a serious error and properly rejected by Judge Mishler.

Item III - $650,000 Loan Pursuant to Court-Approved Agreement of August 14, 1963, Master 139a; Judge 167a-168a; Tr. 719-770.

Talcott claimed 39 hours were spent by Hahn in

connection with this item. The Master allowed the time in full, over the Trustee's objection, and Judge Mishler denied any allowance.

This loan was required by the Trustees to keep the operations of the debtors alive. Contrary to Talcott's assertion (Br. 23), Talcott agreed to make the loan only if the Trustees sold certain routes. It is crucial to note that the loan of $650,000 was to be used as working capital in order to start up new production. None of the money was to be used or in fact was used to satisfy pre-existing debt due to Talcott. Thus, the Master clearly erred when he stated that Hahn's efforts were "part of the service to 'enforce payment'" (139a). This loan was a separate and independent transaction between Talcott and the Trustee. Hahn represented Talcott in the negotiations and subsequent court proceedings and the charge for these services must be borne solely by Talcott.

Item IV. Sale of Routes Pursuant to Agreement of August 14, 1963. Master 139a-140a; Judge 168a-170a; Tr. 771-803.

The Trustee relies on the thorough and well-reasoned rejection of this claim by Judge Mishler (168a-172a). We must note, however, that a considerable portion of

the time spent by Hahn and virtually all the time spent by Novick involved Dana Vending, Silco, the ultimate purchaser of the routes and Talcott. The absurdity of the Master's findings is highlighted by the fact that he allowed all of the time claimed by Hahn in negotiating financing arrangements between Silco and Talcott. This, according to the Master, is an expense to be borne by the creditors of Continental Vending. Judge Mishler quite correctly rejected this finding and his decision should be affirmed.

Item V. $750,000 Loan Pursuant to Court-Approved Agreement of November 20, 1963.
Master 141a; Judge 172a-174a; Tr. 868-979.

In this item, Hahn represented Talcott in negotiations with the Trustee for an additional loan of $750,000 to be used as working capital. There was no relationship between this loan and the collection or enforcement of debt arising under the financing agreement -- the only basis on which Talcott can claim an allowance. Here again, it was apparently the position of the Master, rejected by Judge Mishler, that simply because Talcott might eventually benefit by the infusion of additional working capital, work done by counsel for Talcott was reimbursable under the financing agreement. The error of the Master's logic is apparent on its face.

Item IX. Preparing and Filing Proofs of Claim. Master 141a; Judge 175a; Tr. 1185-1200.

We recognize that an exception may exist to the general rule that a creditor may not be reimbursed for attorney's fees in preparing a proof of claim. 3A Collier (14th ed.) ¶ 62.29, p. 1582 et seq. This exception is by no means mandatory and the general rule against such an allowance "may be otherwise, however, where the claim is based on a note which includes in its terms a reasonable attorney's fee." Collier, supra, p. 1583, footnote 58. (Emphasis added)

This exception has been allowed where the only work done by the attorney to enforce collection is the submission of a proof of claim. Where, as here, however, the creditor is allowed attorney's fees for other collection services, the general rule applicable to all creditors should be applied. Rejection of this item by Judge Mishler was proper.

Item X. Claim of Internal Revenue Service. Master 142a; Judge 175a; Tr. 1200-1214.

The Master supported this allowance by reference to the provision in the financing agreement whereby the borrower agreed to pay all costs and expenses in defending any proceeding brought against Talcott. This particular claim by the

IRS did not arise out of the financing of receivables by Talcott, but rather a separate advance by Talcott to the debtors to meet their payroll for the period March 1 to April 7, 1963. Talcott eventually satisfied the IRS that the claim was improper, but the charge to the estate has no basis under the financing agreement or § 243. The rejection of the Master's findings was proper.

Item XI. Trustee's Action to Recover an Alleged Preference. Master 142a; Judge 175a-176a; Tr. 979-998.

The Trustee relies on Judge Mishler's findings (175a-176a).

Item XII. Proceedings by American Catalogue Company. Master 142a; Judge 176a-177a; Tr. 1228-1238.

Here again, the failure of the Hahn firm to keep accurate time records did not deter the Master from allowing the full estimate of time made by Hahn. In this instance, Judge Mishler, who presided over these hearings, was quite familiar with the work done and it was not error for him to reject the unsupported findings of the Master who had no familiarity with these particular proceedings. Having failed to heed the warnings of this Court that attorneys

keep accurate time records, it is too late now for Talcott to complain.

Item XIII. Services re James Talcott, Inc. v. Vending Unlimited, Inc. Master 143a; Judge 177a; Tr. 1018-1019.

The Trustee relies on the findings of Judge Mishler (177a).

Item XIV. Satisfaction of Superior Liens on Three Routes. Master 143a; Judge 177a-178a; Tr. 1072-1091.

Talcott's objection is based on Judge Mishler's reduction of hours allowed by the Master. Again, we emphasize that the Master gave no consideration to the fact that the Hahn firm failed to keep adequate time records. Instead, the Master accepted the estimates given by Hahn as though fully supported. We do not believe that Talcott's counsel can continue to avoid the mandates of this Court by attempts at "reconstructing" time. See In Re Borgenicht, 470 F.2d 283 (2d Cir. 1972).

In the instant case, the Master had no familiarity whatsoever with the proceedings prior to the reference. Clearly, he would have had no basis on which to judge the accuracy of the estimates given by Hahn. Judge Mishler, on

the other hand, has been in charge of these proceedings since the filing of the petition in July, 1963. We submit that he is eminently more qualified to determine the accuracy of the Hahn estimates than was the Master. By reducing the number of hours allowed by the Master, Judge Mishler found the Master's report to be clearly erroneous and his decision should be affirmed.

Item XV. Proceeding by Automatic Canteen Co. of America. Master 143a; Judge 178a-179a; Tr. 1214-1228.

For the reasons set forth in Item XIV above, Judge Mishler's findings should be affirmed.

Item XVI. Examination of Talcott's Officers in Trustee's Mass Action. Master 143a; Judge 179a-180a; Tr. 1014-1041.

The Trustee had commenced an action against the former officers, directors, accountants and others connected with the affairs of Continental. Talcott was not named as a defendant, but since a number of its officers and employees were familiar with numerous relevant transactions, it was both proper and necessary that the Trustee seek to take their pre-trial depositions. Judge Mishler was quite correct

when he found that the examinations were indirectly related to the financing agreements.

Talcott's argument that the examinations related to a preference action later brought against Talcott is absurd on its face. This is merely an attempt to circumvent the facts and bring these services within the language of the financing agreement. Were the Master's allowance permitted to stand, the creditors of Continental would be paying not only for the legal assistance furnished to Talcott's officers and employees but for the attempts by Talcott's counsel to quash the subpoenas served by the Trustee as well. Rejection of this time by Judge Mishler was altogether proper.

Item XVII. Action by and Against General Electric Corp. Master 144a; Judge 180a; Tr. 1421-1422.

The Trustee relies on the decision of Judge Mishler (180a.)

Item XVIII. Trustee's Sale of Remaining Physical Assets, Etc. to Vendo Co. Master 144a; Judge 180a; Tr. 1042-1063.

Some further comment is warranted over and above Judge Mishler's cogent conclusion (180a). The Master erred in his conclusion that Talcott arranged for the sale of assets

to Vendo (144a). Indeed, Hahn admitted that he did none of the legal work, did not represent the buyer or the seller, and that his legal services were limited (Tr. 1047-1048). Unlike the Master, Judge Mishler was intimately familiar with the sale of the assets to Vendo and the hard bargaining and efforts of the Trustee and his counsel. In any event, the limited efforts of Hahn (for which the Master has allowed $2,000) is not reimbursable since efforts to assist in the sale of a debtor's assets cannot be charged to the estate. See In Re Cambridge Nuclear Corp., supra.

Item XIX. Repayment by Trustee of Talcott's $750,000 Loan. Master 144a-145a; Judge 181a-182a; Tr. 1130-1135.

Since these services were not directly related to the original financing agreement or activities thereunder, but rather a separate and distinct transaction in December, 1963, these services are not properly reimbursable.

Item XX. Miscellaneous Services. Master 145a; Judge 182a; Tr. 1394-1445.

The Trustee relies on the careful and studious review and findings of Judge Mishler (182a-184a).

The following items relate to those services set forth in Hahn's supplemental affidavit (Record Doc. 8, Exhibit C, 344-361).

Item I. Distribution of Route Proceeds. Master 145a; Judge 185; Tr. 1752-1831.

The original claim sought an allowance for 200 hours spent by Abeson. The Trustee conceded 100 hours and the Master allowed 100 hours. Judge Mishler found, however, that this work was duplicative of the work performed by the Trustee and therefore not properly reimbursable. The Trustee now supports Judge Mishler's findings.

Item II. Automatic Canteen Company's Claim to Attorney's Fees out of Proceeds of the Hammond Route. Master 145a; Judge 185a-186a; Tr. 1709-1733.

Although the Trustee originally conceded 75 hours for Abeson, which was allowed by the Master, the Trustee now adopts the findings of Judge Mishler (185a-186a) that these services were rendered solely for the benefit of Talcott and therefore not reimbursable by the estate.

Item III. Objection to Confirmation of Trustee's Plan. Master 146a; Judge 186a-187a; Tr. 1267-1339.

At the time of the hearings before the Master and even at the time of Judge Mishler's decision, there had been no final determination of Talcott's objection to the Trustee's Plan. Talcott's objections were held invalid by this Court In Re Continental Vending Machine Corp., 517 F.2d 997 (2d Cir. 1975), and certiorari was denied on February 23, 1976, ___ U.S. ___, 96 S. Ct. 1111. Talcott at first argued that if successful, it would be entitled to reimbursement. Now it argues that the objection to the Plan was an attempt to obtain payment of security and that "some reimbursement is properly in order" (Br. p. 30C).

Judge Mishler properly held that attorney's fees are not compensable under § 243 unless the opposition is successful. See In Re Mortgage Guarantee Co., 40 F. Supp. 226 (D.C. Md. 1941).

The Master allowed this item and computed the amount as $9,000 (146a). Not only his reasoning but his calculations are in error. Accepting the hourly rates fixed, Hahn's time of 151 hours would amount to $7,550 and Abeson's 579 hours would be $14,475, or a total of $22,025.

This is the amount the creditors who voted to accept the Plan would be required to pay Talcott for its unsuccessful opposition. The rejection by Judge Mishler should be affirmed.

Item IV. Application for Payment of Conservator's and Trustees' Certificates. Master 147a; Judge 187a; Tr. 1339-1380.

These Services arose in September, 1972, when Talcott moved for an order directing the Trustee to pay the balance due on Trustees' Certificates. The Trustees objected claiming that Talcott had misapplied funds received on behalf of the debtor and cross-moved for an accounting. Ultimately, this Court directed that Talcott file a proof of claim for reimbursement of legal and accounting charges. In Re Continental Vending Machine Corp., 491 F.2d 813, 821-822 (2d Cir. 1974). It was this proof of claim which was referred to the Master for hearings and which led to the decision of Judge Mishler now under review.

The work performed by the Hahn firm related to the Talcott claim for payment of the Trustees' Certificates. This was not a proceeding under the financing agreement and as Judge Mishler found, not allowable under § 243. Thus, under any standard the Master was in error and Judge Mishler's rejection should be affirmed.

Other Matters

By applying the hourly rates fixed by the Court in In Re Continental Vending Machine Corp., 318 F. Supp. 421 (E.D.N.Y. 1970), the Master concluded that Talcott was entitled to $127,250 (149a). In recognition of "the quality of the services rendered, the difficulty of the questions involved, the benefit to the estate and the professional standing" (151a-152a), he arbitrarily increased the allowance to $150,000. This increase was summarily rejected by Judge Mishler and we urge correctly so.

At the hearings, Talcott reduced its claim for legal disbursements and accounting charges to $95,645.38 which sum was allowed by the Master. Judge Mishler reduced this amount to $90,373.84 (190a). Talcott has raised no objection to this portion of the Order of November 18, 1975 and therefore this portion of the Order should be deemed affirmed.

In its Order of December 15, 1975, the court below rejected the claim for disbursements in the amount of $6,544.08 (Record Doc. 8, Ex. E) (206a-208a). Since Talcott has raised no objection to this determination we deem it to have abandoned its appeal from this portion of the Order.

Finally, the Order of December 15, 1975 makes an allocation of fees between the two debtors, Continental Vending and Continental Apco (208a-209a). Here again, Talcott makes no objection and this portion of the appeal is deemed abandoned by Talcott.

We conclude this portion of our brief with the following language of the Court in Gochenour v. Cleveland Terminals Bldg. Co., 142 F.2d 991 (6th Cir. 1944) at p. 995:

> "The judgment of a court of bankruptcy regarding allowances of attorney's fees should not be disturbed on appeal unless there is a clear abuse of discretion amounting to a manifest disregard of right and reason (cases cited).
>
> "The trial judge is familiar with proceedings in his court and also his expert knowledge as to the value of legal services. He should therefore, have a broad discretion on the subject since he has a far better means of measuring what is just and reasonable than an appellate court."

POINT II

JUDGE MISHLER PROPERLY REFUSED TO DISQUALIFY HIMSELF PURSUANT TO TITLE 28, U.S.C., § 455.

Talcott's quotation from Title 28, U.S.C., § 455 at page 32 of its brief is in error. The quotation as it appears is from the statute prior to its amendment effective December 5, 1974. The pertinent language of the amended statute reads as follows:

> "(b) He [the judge] shall also disqualify himself in the following circumstances:
> (2) where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;"

Thus, it is now required that before a judge shall disqualify himself he must have been a material witness in the matter in controversy. Judge Mishler, in refusing to disqualify himself, recognized this and stated: "the issue on which this writer testified before Judge Judd is unrelated to the issue of entitlement to fees." (205a) Talcott is in error when it states at page 33 of its brief that § 455 does not condition disqualification on such identity of issues. The precise language of the amended statute referring to matter in controversy clearly requires such identity of issue.

As this Court is well aware, the Chapter X proceedings have been pending in the District Court for almost 13 years. During this period of time there have been numerous and varied controversies between the Trustee and interested parties. One such controversy involved the so-called Silco Reserve. Briefly stated, the Trustee contended that surplus funds arising from the sale of routes pursuant to an agreement dated August 14, 1963 should have been used to satisfy outstanding administration debt. Talcott contended that these surplus funds should have been applied to the reduction of debts due from Continental. The uncertainty of the language of the agreement led this Court to remand the question for a further determination. In Re Continental Vending Machine Corp., 491 F.2d 813 (2d Cir. 1974).

Since Judge Mishler had expressed an earlier opinion with respect to the August 14 Agreement, and since he had been advised that the Trustee intended to call him as a witness, he recused himself and the hearing on the Silco issue was assigned to Judge Judd. Ultimately, Judge Judd ruled in favor of Talcott.

The instant proceeding, completely separate and distinct from the Silco matter, also arose from this Court's ruling in In Re Continental Vending Machine Corp., supra.

In a separate part of the opinion this Court agreed that Talcott should file a proof of claim with respect to the reimbursement for legal fees and accounting charges. The matter in controversy in the present proceeding is in no way related to the matter in controversy before Judge Judd. Therefore, we submit that the language of § 455 is totally inapplicable.

Judge Mishler has presided over all aspects of the Chapter X proceeding since July, 1963 (except for the assignment of the Silco matter to Judge Judd). To hold that his testimony in the Silco matter would require his disqalification would clearly nullify a basic concept of Chapter X that a district judge constantly scrutinize the corporate reorganization proceedings. 6 Collier on Bankruptcy, ¶ 0.05 and n.17. See also United States v. Re, 372 F.2d, 641, 645 (2d Cir. 1967).

Talcott's reliance on United States v. Amerine, 411 F.2d 1130 (6th Cir. 1969) is misplaced. There, the judge had previously been the United States Attorney when the indictment was returned and disqualification was automatic. Indeed, under the amendments (§ 455(b)(3)) where the judge has been a former governmental employee, his disqualification is mandatory.

At pages 35 and 36 of Talcott's brief there appears references to a letter written by Judge Mishler before his testimony, and references to various portions of his testimony before Judge Judd. We have difficulty comprehending the argument being advanced by Talcott at this point in its brief. However, we note that there are several references to the suggestion of possible defenses for the Trustee. So that there may be no confusion we point out that all of these so-called possible defenses were raised in cross-examination, and the direct examination of Judge Mishler (56a-65a) contains none of these so-called defenses and is merely a recitation of the events of August 14 and 16, 1963.

Again, at pages 37 and 39 of Talcott's brief references are made to certain statements made by Judge Mishler in 1974. Again, it is difficult to understand the purpose of these references except perhaps as some feeble attempt by Talcott to justify its totally unsupported statement at page 39 that "It is reasonable to view the testimony as a reflection of the Judge's hostile, though perhaps not always entirely apparent, reaction to Talcott's prodding motion critical of its handling of its claims." Presumably, Talcott is suggesting that Judge Mishler was prejudiced and

therefore should disqualify himself. Certainly, this is the first time any suggestion of prejudice has been raised and an examinati n of the affidavit supporting the motion to disqualify (196a-200a) reveals that the sole basis of this motion was the fact that Judge Mishler had testified in the Silco hearing. It is unfortunate indeed that Talcott should now raise this baseless charge of prejudice and particularly so when the accusation was never even made to Judge Mishler.

At page 39 of Talcott's brief there appears a rather incredible suggestion that it is remarkable that the Trustee has terminated by compromise a large number of controversies, but disputes with Talcott alone remain unresolved. First, the Trustee had commenced a preference action against Talcott, which action was subsequently settled when the Trustee withdrew the claim. In addition, the Trustee settled with Talcott, among other creditors, the proceeds of the sale of all of the routes. Only three issues with Talcott required litigation, and one of these was brought on by Talcott objecting to the Trustee's Plan; the other two were the Silco issue and the present proceeding. Talcott's argument appears to suggest the existence of collusion between the Trustee and Judge Mishler adverse to the interests of Talcott. Ordinarily, such a baseless suggestion ought not

to be dignified by a response and we shall limit our response merely by saying that the suggestion is outrageous and hardly appropriate for eminent counsel to have even made in the first instance.

We would conclude our argument on this Point with a brief recitation of the chronology of events significant to this Point.

On May 5, 1975, counsel for the Trustee indicated to Talcott's counsel that he intended to call Judge Mishler as a witness in the Silco hearings before Judge Judd (198a). On May 23, 1975, Talcott moved before Judge Mishler for an order confirming the Report of the Master (9a). In short, some three weeks after Talcott was advised that Judge Mishler would be a witness, it nevertheless moved for an order confirming the Master's Report before the very same judge it now says should have disqualified himself.

On June 30, 1975, Judge Mishler testified before Judge Judd (56a). At this time Talcott's motion to confirm and the Trustee's objections to the Master's Report were under consideration by Judge Mishler. Still, no application or suggestion was made by Talcott that Judge Mishler disqualify himself.

On November 18, 1975, Judge Mishler rendered his

decision, over six months after Talcott had been advised that he would be a witness and almost five months after he gave testimony. By notice of motion dated November 21, 1975, the Trustee moved for reargument. Not until December 2, 1975, beyond the 10-day period as fixed by Rule 9(m) of the General Rules of the Court, did Talcott cross-move and for the first time sought an order that Judge Mishler disqualify himself. Not only was the application not timely made, but certainly not a proper subject of a cross-motion to reargue since the question of disqualification had never been raised prior to December 2, 1975.

In summary, we submit that Judge Mishler's testimony in the controversy concerning the Silco issue in no way disqualifies him from determining the question of reimbursement of fees. We urge the Court to reject out of hand the innuendos suggested by Talcott and to confirm Judge Mishler's refusal to disqualify himself.

Conclusion

The original proof of claim filed by Talcott requested an allowance of $267,490.58 for legal services performed for the period March, 1963 through March, 1973. An examination of the claim (Record Document 8) will at once reveal that Talcott sought to be reimbursed for every hour of time spent by its counsel in connection with the Chapter X proceedings. No conference, no court appearance, no telephone call has been excluded from the estimates of time (estimates made necessary by counsel's failure to maintain proper records).

Just how outrageous the claim is can best be shown by a reference to the most blatantly improper claim. Thus, for example, Talcott seeks to be reimbursed for having its counsel represent the purchaser of routes from the Trustee, in negotiations with Talcott, leading to financing the cost of the purchase. It is this attitude of "let the estate pay for everything" which permeates the entire claim.

It is unfortunate that the Master, unfamiliar with the prior proceedings, accepted the entire claim at virtually face value. Judge Mishler, on the other hand, in a meticulous review of each and every item claimed, reduced

the allowance to a proper amount consistent with the rights of Talcott and the applicable provisions of the Bankruptcy Act.

The second issue raised on appeal relates to the refusal of Judge Mishler to disqualify himself. We submit that no legal or factual basis exists for such disqualification.

Accordingly, the Trustee respectfully submits that the Order of November 18, 1975 and the Order of December 15, 1975, both be affirmed in their entirety.

Respectfully submitted

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